In the Supreme Court

OF THE

United States

OCTOBER TERM, 1938

No. 15

WAIALUA AGRICULTURAL COMPANY, LIMITED,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, et al.

No. 17

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Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED.

REPLY BRIEF OF ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON.

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Subject Index

Table of Authorities Cited

Cases

Encyclopedias and Notes

Statutes

Treatises

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The respondent, Eliza R. P. Christian, hereinafter called the "incompetent" presents her brief in reply to that of

the petitioner Waialua Agricultural Company, hereinafter called "Waialua", in support of its affirmative case in No. 15.

STATEMENT OF THE CASE.

Waialua's statement of the case is not entirely accurate and we refer to the opening brief of the incompetent, pages 1 to 11, for a complete recitation thereof, confining ourselves here to the correction of certain of the more important mistakes. We enumerate them:

1. The Circuit Court of Appeals did not make an independent finding, on its own review of the evidence, that Waialua took without knowledge, as is implied at page 3 of Waialua's brief. It accepted what it said was a finding by the trial and the Supreme Court that such was the fact (R. 1605) or, as it later stated, in denying a rehearing (R. 1637), it reached its opinion "on the assumption that the company did not have such notice". The trial Court did not find that Waialua did not have knowledge. What it did was to assume, as did the Circuit Court of Appeals, the want of such knowledge, basing this assumption (erroneously, as we contend[1]) on its finding that it was not "clearly shown that Waialua Company had actual notice of the incompetency of Eliza". (R. 154, 158). It is our position that it follows as a matter of law from the facts found by the trial Court, which remain undisturbed by either of the Appellate Courts, that Waialua did have knowledge of the incompetency through its

1. Op. Br. of Eliza R. P. Christian, pp. 28-30.

agent in the purchase, James L. Holt. We refer to our opening brief, pages 28 to 47.

2. The decision of the Circuit Court of Appeals was not that the contract of an incompetent is void in the sense of being a nullity, as implied by Waialua on page 4 of its brief, but, on the contrary, was based upon the proposition that the contract of an incompetent may be set aside at the instance of the incompetent upon making restoration to status quo.[2]

3. The recovery awarded the incompetent does not, as might be inferred from Waialua's statement (p. 4), mean the reconveyance to her of 28% of its entire plantation, *or any specific part thereof*. As will be pointed out in detail lafer, it means only that she recovers an undivided one-third interest in an area the whole of which comprises approximately 28% of Waialua's land holding, the other undivided two-thirds of which will still be owned or held by Waialua which will remain in possession of the whole of its plantation as a tenant in common with the incompetent. Furthermore, even a partition of the area between the incompetent and Waialua could be made so that no part of the land used by Waialua for its own plantation would be taken from it.

4. The contract of 1906 purported to assign only the rentals under the 1905 lease and nothing more (Op. Br. of Eliza R. P. Christian, p. 4, fn. 2). It did not carry any "other rentals which might thereafter accrue", as stated by Waialua (at pp. 5, 16).

2. Opposing brief of Eliza R. P. Christian to Petition of Waialua Agricultural Company, Ltd. for Writ of Certiorari, pp. 7 to 10, and Opening Brief of Eliza R. P. Christian, p. 9.

5. A guardian was appointed in Hawaii for the first time in 1927 (R. 847) and did not wait two years, as implied by Waialua (p. 6) before giving Waialua the notice which was followed by this action (R. 847). The English Receiver appointed in 1926 had authority only over the ward's property in England (R. 847).

6. The trial Court not only found that Eliza Christian was incompetent but, among other things, that status quo could be restored (R. 526). Its decision did not, as Waialua implies (p. 6), rest solely on the finding of incompetency, but was coupled with the finding that restoration could be effected.

7. The order of remand by the Supreme Court of Hawaii directed to the trial Court was limited in its scope to *exclude* any further evidence of incompetency (R. 326, 552), the Supreme Court having found that Eliza Christian was a "congenital imbecile" (R. 272, 273). The trial Court acted in accordance with the remand order when it refused to accept further evidence on incompetency (R. 552), and the error referred to on page 7 was not that of the trial Court, and, in fact, there was no error committed. (Op. Br. Eliza R. P. Christian, pp. 49-53.)

8. In reciting what the Circuit Court of Appeals did, on page 8, it should be added that that Court confirmed the finding of incompetency and the finding that status quo could be restored (R. 1605).

(NOTE): We also wish to correct two other possible points of confusion. At page 16 of Waialua's brief, it is stated that no transaction of the incompetent, other than those here involved, has ever been challenged, "so far as the record shows". Strictly construed, the statement is correct. The record contains no evidence of an attack on any transaction with persons or corporations other than Waialua not involved in this case. Obviously, any such

THE ARGUMENT.

THE QUESTIONS PRESENTED.

In view of the scope of Waialua's argument, it would seem well to first point out that the *only* questions before this Court in support of Waialua's contentions are those set forth in its petition for certiorari. (*General Talking Pictures Corporation v. Western Electric Co.* (1938), 82 L. Ed. (Ad. Op.) 843.) The application of this rule narrows the issues of law substantially. It eliminates consideration of the fifth error referred to on page 9 of Waialua's brief; i. e., that the incompetent is not entitled to recover the rental value of her land, and also the suggestion, at page 10, that laches bars the recovery. While Waialua does not dignify the laches argument by a heading or section of its brief, it cites various cases which relate only to that question.[3] At no place in Waialua's petition for certiorari, or even in its supporting brief, does it mention either point. The issue of laches was specifically decided against Waialua in the trial Court, the Supreme Court of Hawaii, and the Circuit Court of Appeals (R. 1605). Beyond that, it is the rule that an incompetent

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evidence, if offered, would have been excluded as immaterial. But if the purpose of the statement is to imply that, *in fact*, the incompetent's other transactions have all been permitted to stand unchallenged—and we can see no other purpose—we think we are justified in stating that the record of the guardianship proceedings in Hawaii shows that the Court having jurisdiction, on July 17, 1929, made an order authorizing the guardian of the incompetent to compromise a claim founded on the incompetent's alleged right to set aside her conveyance to John M. Dowsett of her contingent interest in lands at Waianae, based on a prior option executed by the incompetent to May K. Brown, these transactions being the ones described at pages 17 and 18 of Waialua's brief.

At page 20, Waialua states that Eliza Christian never appeared in court in this proceeding and has never been examined by medical experts appointed by the Court. The record discloses (R. 1234) that at the conclusion of the deposition of Annie Kentwell taken in England the incompetent's counsel advised Mr. Castle, who was present at the deposition, that the incompetent was not to be produced at the trial and invited him to have her examined by his own medical experts. This Mr. Castle declined to do.

3. Infra, fn. 41, p. 49.

cannot be guilty of laches.[4] As we pointed out in our opening brief (p. 4, fn. 2), the instrument of 1906 in no event is more than an assignment of rents under the 1905 lease, which expired in 1930, and therefore, regardless of the validity of the lease and the assignment, the incompetent is entitled to the rents from 1930.

With these eliminations, the errors subject to review upon Waialua's petition, then consist of the first four enumerated on pages 8 and 9 of Waialua's brief.

No. 1 is that the Court erred in holding the instrument to be void;

Nos. 2, 3 and 4 are, in truth, but a single point, namely, that the Court erred in holding that status quo, within the meaning of the rule, could be restored.

In fact, then, Waialua makes two points. We will frame our answer accordingly.

The Circuit Court of Appeals did not decide that the instruments were void in the sense of being nullities.

In the interest of accuracy, and in deference to the Circuit Court of Appeals, we repeat that Waialua misconceives the basis of the decision, and refer to our brief in opposition to Waialua's petition for certiorari,[5] wherein we pointed out that the real basis of the decision was that, even assuming the adequacy of the consideration and the good faith of the other contracting party, an incompetent may set aside his contracts upon restoring the status quo, and in this case that status quo can be and was restored.

4. Infra, fn. 43, p. 50.
5. Opposing brief of Eliza R. P. Christian to petition of Waialua Agricultural Company, Ltd. for certiorari, pp. 7 to 10.

Waialua's failure to fairly state the grounds upon which the lower Court rested its decision warrants this Court in dismissing the writ issued upon its petition. (*Sutter v. Midland Valley R. R. Co.* (1929), 280 U. S. 521, 74 L. Ed. 590.)

EVEN ASSUMING (WHICH WE DENY) THAT WAIALUA TOOK WITHOUT KNOWLEDGE OF THE INCOMPETENCY IN A FAIR BARGAIN AND FOR AN ADEQUATE CONSIDERATION, THE LOWER COURT CORRECTLY DECIDED THAT ALL THREE INSTRUMENTS SHOULD BE CANCELLED UPON CONDITION THAT RESTORATION BE MADE.

ANSWER TO WAIALUA'S POINT I.

The American rule.

If Waialua were correct in its contention that the decision of the Circuit Court of Appeals rested upon the proposition that the contract of an incompetent is void in the sense of being a nullity, the decision would have been followed the established rule in the Federal Courts,[6] which, as we have pointed out in our opening brief,[7] is the rule to be applied in this case arising in the Territory of Hawaii. However, it did not rest its decision on that rule, but followed the rule more favorable to Waialua, and accordingly, Waialua has no ground of complaint.[8]

The rule applied by the Circuit Court of Appeals in this case is as favorable to Waialua as the law established in

6. *Dexter v. Hall* (1873), 82 U. S. 9, 21 L. Ed. 73; *Kendall v. Ewert* (1922), 259 U. S. 139, 66 L. Ed. 862; *Plaster v. Rigney* (C.C.A. 8, 1899), 97 Fed. 12, *Edwards v. Davenport* (1883), 20 Fed. 756; *Anglo-California Bank v. Ames* (1886), 27 Fed. 727; *German Savings & Loan Society v. De Lashmutt* (1895), 67 Fed. 399; *Clark Car Co. of New Jersey v. Clark et al.* (D.C. Pa., 1925), 11 Fed. (2d) 814; *Sothern v. United States* (D.C. Ark., 1926), 12 Fed. (2d) 936; *Farmers Bank & Trust Co. v. Public Service Co. of Ind.* (1936), 13 Fed. Supp. 548.

7. Opening brief of Eliza R. P. Christian, pp. 48, 49.

8. *Alexander v. Cosden Pipe Line Co.* (1934), 290 U. S. 484, 78 L. Ed. 452.

any jurisdiction in the United States. With at most one exception,[9] Waialua has cited, and we have found, no case decided by any State or any Federal Court, in which cancellation of a contract has been denied to an incompetent where—as has been found here by the trial Court, the Supreme Court of Hawaii and the Circuit Court of Appeals—restoration has been offered and status quo can be restored. And even in the State in which the one exceptional decision to which we have referred was decided, other and later decisions justify the conclusion that the law of that State itself is in accord with the view that the incompetent has the option of disaffirmance, where status quo can be restored, even as against a bona fide purchaser for an adequate consideration. (Infra, p. 11.) There are a few cases from State Courts which have denied relief to the incompetent where either the incompetent did not choose to offer restoration, or restoration was equivalent to permitting recovery by the other party. An example of this latter type of case is one where the recovery against the incompetent is granted the holder of a promissory note evidencing a loan of money made to the incompetent. Restoration, as pointed out in one of the cases, would, in that situation, mean paying the loan, which is all the other party seeks in his action. (*Merchants National Bank v. Coyle* (1919), 143 Minn. 440, 174 N. W. 309.) Language can be found in a few of the cases from State Courts which would seem to sustain Waialua's argument, but when these cases are analyzed, we submit the decisions will not support the rule claimed for them.

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9. *Riggan v. Green* (1879), 80 N.C. 236.

Disregarding, for the moment, the decisions in the Federal Courts (including this Court), in our opening brief we cited, and rely upon, decisions of Courts in twenty-three states,[10] to which we add those from two states.[11] Waialua's brief cites cases from ten States,[12] which, it is argued, sustain the view advanced by it. We do not concede that the decisions cited by Waialua establish the law, of the several jurisdictions from which they arise, to be in accordance with Waialua's contention.

The great weight of authority supports the incompetent's position.

So far as we are able to ascertain, it is, as stated above, the rule of decision in twenty-five States[13] that an incompetent may set aside his contract, regardless of the good faith of the other party and of the adequacy of the consideration, in the event that restoration to status quo is made. In eight states the rule of decision is that the contracts of incompetents are void in the sense of being nullities.[14] One State, New Hampshire, may be doubtful. The remaining states have apparently not decided the point, or have passed statutes covering the question. With respect to those jurisdictions claimed by Waialua in its opening brief, we now proceed to review all the applicable decisions.

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10. Opening brief of Eliza R. P. Christian, p. 15, fn. 4.
11. *Langley v. Cease* (1922), 122 S.C. 203, 115 S.E. 230; *Elder v. Schumacher* (1893), 18 Colo. 433, 33 Pac. 175.
12. Waialua's opening brief, p. 48.
13. Opening brief of Eliza R. P. Christian, p. 15, fn. 4; supra, fn. 11.
14. *Thompson v. New England Mortgage Security Co.* (1895), 110 Ala. 400, 18 So. 315; *Galloway v. Hendon* (1901), 131 Ala. 289, 31 So. 603; *McEvoy v. Tucker* (1914), 115 Ark. 430, 171 S. W. 888; *Jacks v. Estee* (1866), 53 Me. 451; *Brigham v. Fayerweather* (1887), 144 Mass. 48, 10 N.E. 735; *Cleaveland v. Malden Savings Bank* (1935), 291 Mass. 295, 197 N. E. 14; *Boyd v. Mulvihill* (1901), 61 Neb. 878, 86 N. W. 922; *Farley v. Parker* (1876), 6 Ore. 105; *Campbell v. Campbell* (1913), 35 R. I. 211, 85 Atl. 930.

New York.

Waialua cites *Mutual Life Insurance Co. v. Hunt* (1880), 79 N. Y. 541, and *Goldberg v. McCord* (1929), 251 N. Y. 28, 166 N. E. 793. The *Mutual Life* case was one to recover on a promissory note and mortgage given by the incompetent for funds loaned, and the Court points out that status quo could not be restored. Restoration would mean paying the debt sued on. In the *Goldberg* case, the Court found that there was no evidence of incompetency, and beyond that the question of validity of the deed was not being raised by the alleged incompetent but by one who had contracted to purchase the property from a remote grantee of the incompetent and who objected to the marketability of the title. As Chief Judge Cardozo pointed out in *Hoadley v. Hoadley* (1927), 244 N. Y. 424, at 431, 155 N. E. 728, the right to avoid the transaction in which an incompetent engages "is for the personal protection of the one who is disabled".

Neither case stands for the rule contended for. We cited *Loomis & Hayden v. Spencer & Rolph* (1830), 2 Paige N. Y. 153, and *Riggs v. American Tract Society* (1881), 84 N. Y. 330, in each of which the incompetent obtained cancellation; in one upon effecting restoration, and in the other without doing so because it did not appear that the incompetent had received any benefit. To these we add *McCarthy v. Bowling Green Storage & Van Co.* (1918), 182 App. Div. 18, 169 N. Y. S. 463, wherein the incompetent had relief from a contract of purchase of personal property upon making restoration, and *Church v. Dreier* (1923), 205 App. Div. 820, 200 N. Y. S. 543, in which a settlement agreement by an incompetent was set aside.

North Carolina.

Waialua cites *West v. Seaboard Airline R. R.* (1909), 151 N. C. 231, 234, 65 S. E. 979. This case would appear to turn upon the failure of the incompetent to offer restoration. As shown by the later case of *Ipock v. Atlantic & N. C. R. Co.* (1912), 158 N. C. 445, 74 S. E. 352, cited with approval in *Wadford v. Gillette* (1927), 193 N. C. 413, 137 S. E. 314, it is the rule in North Carolina that the incompetent may cancel where restoration is effected, and beyond that the burden of proving lack of knowledge, fairness and inability to restore is upon the other contracting party if he would avoid cancellation.

Iowa.

Waialua cites *Ashcraft v. DeArmond* (1876), 44 Iowa 299, and *Farmers National Life Insurance Co. v. Ryg Co.* (1930), 209 Ia. 330, 228 N. W. 63. Both of these cases turn on the inability or refusal to offer to effect restoration, and neither of them holds that cancellation will be denied if restoration is made. The *Farmers National Life* case was another action to collect a promissory note for money loaned to an incompetent and restoration, of course, would be equivalent to confessing judgment.

In support of the rule for which the incompetent contends, we cited, and rely upon, *Nutter v. Des Moines Life Insurance Co.* (1912), 156 Iowa 539, 139 N. W. 891, wherein, after the death of the insured, his surrender of the policy of life insurance was set aside for incompetency, and a judgment entered on the policy in favor of the widow beneficiary. We add *Hicks v. Northwestern Mutual Life Insurance Co.* (1914), 166 Iowa 532, 147 N. W. 883;

Ayres v. Nopoulos (1927), 204 Iowa 881, 216 N. W. 258; and *Davidson v. Piper* (1936), 221 Iowa 171, 265 N. W. 107, all of which declare the rule that the incompetent may set aside his contracts upon effecting restoration.

Missouri.

Waialua cites *Rhoades v. Fuller* (1897), 139 Mo. 179, 40 S. W. 760. This case turns on the lack of evidence of incompetency.

We cited *McKenzie v. Donnell* (1899), 151 Mo. 431, 52 S. W. 214, and 151 Mo. 461, 52 S. W. 222, wherein the incompetent's deed was cancelled upon restoration of the purchase price although an innocent mortgagee from the grantee was deprived of his security for the loan. We add *Bruner v. Johnston* (Mo. 1921), 228 S. W. 92, and *Kelley v. United Mutual Insurance Corp.* (1938) (Kan. City Crt. Apps. Mo.), 112 S. W. (2d) 929, and submit that the rule in Missouri permits relief to the incompetent upon effecting restoration.

Pennsylvania.

Waialua cites *Beals v. See* (1848), 10 Pa. 56, 49 Amer. Dec. 573; *Rubins v. Hamnett* (1929), 294 Pa. 295, 144 Atl. 72, and *First National Bank v. Fidelity Title & Trust Co.* (1916), 251 Pa. 529, 97 Atl. 75. Of these, only the *Beals* case touches the question and the case really went off on other grounds. In the *Rubins* case, it was found that the party on whose behalf relief was sought was in fact competent. In the *First National Bank* case, the Court instructed the jury that if the maker of the note was incompetent the recovery could be only to the extent of the

benefits received by him—not the amount of the note. This case recognizes the rule contended for by us, and cites with approval the decision to which we point as announcing the law of Pennsylvania, namely, *Wirebach's Executor v. Eastern First National Bank* (1891), 97 Pa. St. 543, 39 Amer. Rep. 821, which followed *Crawford v. Scovell* (1880), 94 Pa. 48, 39 Am. Rep. 766. In view of these last three cases it cannot be said that relief is denied the incompetent in Pennsylvania, even when status quo can be restored. The contrary would appear to be the law.

New Jersey.

Waialua cites *Eaton v. Eaton* (1874), 37 N. J. L. 108, 18 Am. Reps. 716; *Mattheissen v. McMahon* (1876), 38 N. J. L. 536; and *Groff v. Stitzer* (1910), 77 N. J. Eq. 260, 77 Atl. 46. In both the *Eaton* and *Mattheissen* cases the incompetent was given relief, and in the latter the Court's refusal to instruct the jury that "nothing but imposition on an insane person will avoid his contract" was upheld. In the *Groff* case, the incompetent, who pledged shares as collateral for another's debt, was denied complete relief, but even there the Court directed that the lender first exhaust the borrower's security before resorting to the incompetent's. There is no question here of refusing relief, when restoration to status quo can be made. The discussion in the *Eaton* case to the effect that relief will be granted even when there is good faith on the other party's part, where restoration is made is, we submit, indicative of the view of the New Jersey Courts of the question under discussion.

New Hampshire.

Waialua cites *Young v. Stevens* (1868), 48 N. H. 143, 2 Amer. Rep. 202, 97 Amer. Dec. 592. This case turns upon the conclusion that restoration could not be made, and is cited by *Harriman on Contracts* (2d Ed.), Sec. 410, p. 243, in support of the rule for which we contend. Incompetents have been granted relief in New Hampshire where the other contracting party apparently had no knowledge of the incompetency. *Upton v. Conway Lbr. Co.* (1925), 81 N. H. 489, 128 Atl. 802. In fact, in one early case the contract of an incompetent was held to be void. *Flanders v. Davis* (1848), 19 N. H. 139.

Colorado.

Waialua cites *Green v. Hulse* (1914), 57 Colo. 238, 142 Pac. 416. In this case the alleged incompetent was found competent, and beyond that the Court determined that the plaintiffs, who were heirs of the alleged incompetent, were estopped to question the transaction. The decision does not support the rule for which Waialua contends, and we submit that the decision of *Elder v. Schumacher* (1893), 18 Colo. 433, 33 Pac. 175, in its approval of the trial Court's instruction, places Colorado with the great majority of States which permit cancellation upon effecting restoration.

Minnesota.

Waialua cites *Wood v. Newell* (1921), 149 Minn. 137, 182 N. W. 965, in which relief was denied an incompetent who had made a contract for the sale of real estate, but the Court pointed out, at page 139, that "no part of the money has been returned nor offered to be restored" and

also that there had been a ratification of the transaction after the grantor recovered competency. This case does not deny relief when restoration is offered and can be effected.

We rely upon *Schaps v. Lehner* (1893), 54 Minn. 208, 55 N. W. 911, where deeds of an incompetent were set aside upon paying the grantee the value of the improvements he placed upon the property in consideration of its transfer to him. See also: *Merchants National Bank v. Coyle* (1919), 143 Minn. 440, 174 N. W. 309, *Burches v. Goffstein* (1927), 173 Minn. 141, 216 N. W. 793, and *Czyrson v. Roseau County National Bank* (1927), 172 Minn. 420, 216 N. W. 224.

South Carolina.

Waialua cites *Sims v. McLure* (1856), 8 Rich. Eq. (S. C.) 286. There was no suggestion in this case of the willingness or the ability of the alleged incompetent to place the other contracting party in status quo, and the finding of incompetency was not sustained. The rule prevailing in South Carolina is expressed in the later case of *Langley v. Cease* (1922), 122 S. C. 203, 115 S. E. 230, in which the Court, although denying relief to the incompetent, said:

> "In order to set aside the solemn contract of an idiot or weak-minded person where such person received the benefits accruing from such contract, *one of two* things must appear—first, that the parties can be restored to their former status; second, that the other party of the contract had notice, either actual or constructive * * *. Neither appears in this case."

Kentucky.

Waialua cites *Phillips v. Murphy* (1920), 181 Ky. 763, 218 S. W. 250; *McVeagh v. Hicks* (1926), 211 Ky. 284, 277 S. W. 280; *Begley v. Holliday's Committee* (1933), 284 Ky. 453, 58 S. W. (2d) 654; and *Arnett's Committee v. Owens* (1901), 23 Ky. L. R. 1409, 65 S. W. 151.

We point to *Cash v. Bank of Lowes* (1922), 196 Ky. 570, 245 S. W. 137, which was cited in our opening brief, and add the later cases of *Jefferson Standard Life Insurance Co. v. Cheek's Administrator* (1935), 258 Ky. 621, 80 S. W. (2d) 518, and *Inter-Southern Life Insurance Co. v. Hughes* (1928), 224 Ky. 405, 6 S. W. (2d) 447, in each of which the cancellation of a life insurance policy by an incompetent was set aside and the policy reinstated; *Ohio Valley Fire & Marine Ins. Co. v. Newman* (1930), 232 Ky. 363, 23 S. W. (2d) 548, where the incompetent was given relief against his note and mortgage in so far as it represented the purchase of the shares of the defendant which had become worthless. None of the cases cited by Waialua refused cancellation to the incompetent where restoration was offered and could be made. The *McVeagh* case enforced a promissory note for money, but restoration, of course, would have meant paying the loan, which was all the holder sought in the action. In the *Begley* case, the Court pointed out that restoration was not offered. In the *Phillips* case, the finding was that the grantor was competent—not incompetent—hence no ground for rescission was presented. In the *Arnett* case, decided in 1901, it does not appear that restoration was offered to the defendant, who was a subsequent purchaser from the grantee of the incompetent, but if it is assumed that the case stands for the rule con-

tended for, the contrary rule has been announced in Kentucky at least four times since then, as shown by the cases to which we refer. The settled law of Kentucky is that where restoration can be effected, an incompetent may set aside his contracts regardless of their fairness.

The jurisdictions to which we point in support of our view of the rule, and as to which our position is not questioned by Waialua, are Georgia, Illinois, Indiana, Texas, Oklahoma, Mississippi, Connecticut, Kansas, Maryland, Ohio, Tennessee, Vermont and West Virginia. The jurisdictions holding the contracts of incompetents void are, in addition to the United States Supreme Court and the Circuit Court of Appeals for the Eighth Circuit, Alabama, Arkansas, California, Maine, Massachusetts, Nebraska, Oregon and Rhode Island. We submit that it is the rule in each of the ten jurisdictions from which Waialua cites cases that cancellation will be granted to the incompetent when restoration can be effected.

It can be seen from the foregoing review that under practically the universal rule of America, even though we assume that Waialua acted without knowledge of the incompetency and paid an adequate consideration, the questioned instruments will be set aside upon condition that the incompetent restore, which was offered (R. 357-8 and 365-6), and which all the Courts have found can be accomplished.

The English rule.

Waialua admits (p. 52) that "many American courts" have followed the rule contended for by us. The substance

of its attack upon that rule is what it contends is the prevailing rule in England, and Waialua boldly announces that all these American Courts have misunderstood *Molton v. Camroux* (1848), 2 Exch. 487, 4 Exch. 17,[15] and have followed a rule which "has no basis in logic or principle" (p. 52).

We know of no rule of law that an English decision of 1848 should be considered a controlling precedent for the American courts. The fact that in 1789 we adopted the English common law[16] surely does not mean that a decision rendered fifty-nine years after that date by an English Court should now, ninety years later, compel the discarding of the decisions of practically all of our state jurisdictions, as well as the changing of the law as announced in 1873 (*Dexter v. Hall* (1873), 82 U.S. 9, 21 L. Ed. 73), by the United States Supreme Court.

The statute of Hawaii declaring the common law of England, as ascertained by English and American decisions, to be the common law of the Territory (quoted in Waialua's brief, p. 55, note), does not give to English decisions, particularly those of relatively recent date, any authoritative weight superior, or indeed equal, to that of decisions in American jurisdictions. The Supreme Court of Hawaii has so declared. (*Dole v. Gear* (1903), 14 Haw. 554, at 561-4.) Statutes of similar purport have been en-

15. Waialua also cites *Imperial Loan Co. v. Stone* (L.R. 1892), 1 Q. B. 599; *Niell v. Morley*, 9 Ves. Jr. 478 (1804); *Elliot v. Ince*, 7 DeG. M. & G. 475 (1857); *Beavan v. McDonnell*, 9 Ex. 309 (1854); *Campbell v. Hooper*, 3 Sm. & G. 153, 24 L. J. Ch. 644 (1855); *Hassard v. Smith*, 6 Irish Reports, Equity 429 (1872); *Dane v. Kirkwall*, 8 C. & P. 679 (1838); *Brown v. Jodrell*, M. & M. 105 (1827); *Baxter v. Portsmouth*, 5 B. & C. 170 (1826); *York Glass Co. Limited v. Jubb*, 134 L. T. R. 36 (C.A. 1926); *Broughton v. Snook*, 158 L. T. R. 130 (1938).

16. *Gordon v. Washington* (1934), 295 U. S. 30, 79 L. Ed. 1282.

acted in at least nineteen states,[17] and none of these states has followed the English rule that denies relief to incompetents where status quo can be restored. In fact, in five of these states—Massachusetts, Alabama, Arkansas, Nebraska and Georgia—the rule of decision is that incompetents' contracts are void in the sense of being nullities (supra, fn. 14, p. 9).

We have consistently admitted that the rule now prevailing in England is as Waialua would have it here.[18] We repeat that statement now. We do not, however, agree with the logic or soundness of such a rule. As declared by a writer in the Law Quarterly Review[19], it "seems to give a shock to the most fundamental principles of contract law". The *Molton* case and the English decisions which followed it are reviewed at length in an elaborate article in the Columbia Law Review[20] written by W. G. H. Cook, an English barrister connected with the faculty of London University. It is there pointed out that the cases relied on in *Molton v. Camroux* do not support it or the later cases which rely upon the *Molton* case, and also that

17. *California Polit. Code*, Sec. 4468; *Massachusetts Const.*, Ch. 6, Art. 6 (construed as adopting common law of England: *Commonwealth v. Webster* (1850), 5 Cush. 295); *Georgia Code 1933*, Sec. 2-8501 (construed as adopting the common law of England: *Harris v. Powers* (1907), 129 Ga. 74); *Illinois Rev. Stat. 1935*, Ch. 28, Sec. 1; 1 *Burns Indiana Stats. 1926*, p. 149, Sec. 244; *Kentucky Const.*, Sec. 233 (construed as adopting the common law of England: *Nider v. Commonwealth* (1910), 140 Ky. 684); *Texas Stats. 1936*, Art. 1; *Pennsylvania, Purdon's Stats. 1936*, Title 46, Sec. 152; *Arizona Rev. Code 1928*, Sec. 3043; *Kansas General Stats. 1935*, Sec. 77-109; *Vermont Public Laws 1933*, Sec. 1234; *West Virginia Const.*, Art. 8, Sec. 21; *North Carolina Code 1935*, Sec. 970; *Oklahoma Stats. 1931*, Sec. 2; *Missouri Rev. Stats. 1929*, Sec. 645; *New Jersey Const.*, Art. 10, Sec. 1; *Alabama Polit. Code 1928*, Sec. 14; *Arkansas Rev. Stat.*, Ch. 28, Sec. 1; *Nebraska Compiled Stats. 1929*, Sec. 49-101.

18. Opposing brief of Eliza R. P. Christian to Petition of Waialua Agricultural Co. Ltd. for writ of certiorari, p. 14, fn. 4.

19. 17 Law Quarterly Review, p. 147, at 152.

20. Mental Deficiency and the English Law of Contracts, 21 Columbia Law Review, 424.

twice since the decision the Judicial Committee of the Privy Council has refused to follow the rule of the *Molton* case[21]. The article reviews the statutes and decisions of many other countries and shows that England stands alone on the proposition. It also points out the absurdity of such a rule when in the same jurisdiction infants, whose lack of capacity often is based only on a presumption, are permitted to set aside their bargains regardless of their fairness.

The English rule developed from the *Molton* case is illogical in principle, contrary to the rule announced by the United States Supreme Court and practically all of the state jurisdictions. It is recognized as being contrary to the American rule[22]. It should not be applied. The rule of decision to be applied in this case arising in the Territory of Hawaii is the rule of decision in the United States Supreme Court and the Ninth Circuit Court of Appeals, which are the Courts of Appeal from the Hawaiian Courts[23]. Surely, however, there is no occasion to go outside of all the American jurisdictions and for the first time adopt the English rule. It is the common law as developed by the American decisions, not the English decisions, which are in conflict therewith, which should apply.

We turn next to Waialua's contention that status quo cannot be restored, although the finding has been to the contrary by the trial Court, the Supreme Court of Hawaii and the Circuit Court of Appeals.

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21. *Daily Telegraph Newspaper Co. v. McLaughlin* (1904), A. C. 776, 779; *Molyneux v. Natal Land & Colonization Co.* (1905), A. C. 555.

22. *Wald's Pollack on Contracts* (3rd Ed.), p. 100, [illegible]n. 52, wherein the author points out the differences in the English and American rules.

23. Opening brief of Eliza R. P. Christian, note p. 16.

THE FINDINGS OF ALL THREE COURTS ARE THAT STATUS QUO CAN BE RESTORED IN THIS CASE—THE MEANING OF THE TERM.

ANSWER TO WAIALUA'S POINT II.

The trial Court (R. 526), the Supreme Court of Hawaii (R. 297-300 and 579), and the Circuit Court of Appeals (R. 1605) have all found that status quo, within the meaning of the rule, can be restored in setting aside the questioned instruments. The Circuit Court of Appeals said (R. 1605):

> "Both courts found that the appellant was incompetent * * *, that the company could be placed in status quo * * *. These conclusions were reached after careful consideration of the evidence. Exhaustive opinions were written considering the evidence. We accept them * * *."

Waialua seeks to avoid the force of the rule of this Court that it will not re-examine the concurrent findings of lower Courts by declaring, at page 59, that the question is a "pure question of law". We submit, to the contrary, that it is one of fact. It is a determination by the three Courts that it is possible in this case to replace the parties in substantially the positions they would have occupied had the questioned documents not been executed. The term "status quo", as used in discussing the conditions upon which one with a ground for cancellation may set aside a transaction means substantially the position occupied before the transaction. It is an equitable concept. A determination that it can be effected in a given case requires an application of the principle to a set of facts just as a determination that one is incompetent to execute an instrument involves the application of a principle of

law to facts regarding the person's understanding. The determination that status quo can be restored in this case is no less a finding of fact than the finding that Eliza Christian is incompetent, which is now conceded (p. 11) by Waialua. The fact that the three lower Courts each make slightly different provisions for accomplishing the restoration does not detract from the force of their determination that it can be accomplished, but, on the other hand, adds to the persuasive weight of the finding that status quo can be restored in this case. Which one, of different ways, is chosen is a matter largely of discretion. In our opening brief we described each method employed and commented thereon[24]. We submit that the method directed by the United States Circuit Court of Appeals is certainly well within a permissible discretion. However, we have no disposition to avoid an investigation of the question by this Court *de novo*. We refer to our opening brief, at pages 16 to 23, for the authorities which demonstrate the practical application of the rule to the specific facts in upwards of twenty cases. In each of these cases it was found that the requirement of the rule requiring restoration of status quo was satisfied and cancellation of the questioned documents was directed. We confine our discussion here to a review of the cases cited by Waialua on the point, prefacing it with a quotation which emphasizes the objective of the Courts in the cases dealing with incompetents[25].

> "In short, the fact that Mason was an innocent party and parted with his money without notice as to

24. Op. Brief Eliza R. P. Christian, pp. 6-11.
25. *McKenzie v. Donnell* (1899), 151 Mo. 461 (at p. 471); 52 S. W. 222.

McKenzie's condition is wholly immaterial. The doctrine that where one of two innocent persons must suffer, the loss must fall on him who made the condition possible has no application to cases of this character, for an insane person cannot be held responsible for consequences which he could not understand or prevent."

The cases cited by Waialua do not sustain its argument that the three lower Courts were in error in finding that status quo could be restored.

Waialua cites:

At page 64, *Yauger v. Skinner* (1862), 14 N. J. Eq. 289: Here a purchaser who had given a mortgage for the unpaid balance of the purchase price and who was called upon by the grantor's guardian to pay the note, brought an action to either (1) have his title quieted upon paying the note, if the grantor was found to be competent, or (2) to have his note cancelled and the purchase set aside if the grantor was found to be incompetent when the deed was made. Far from objecting to the validity of the conveyance, the guardian contended, and the Court found, that the grantor was competent when the conveyance was made. The ability of the grantor to restore to status quo when seeking to set aside a bargain was in no way involved.

At page 65, *Neblett v. Macfarland* (1876), 92 U. S. 101, 23 L. Ed. 471: Here it was held that the return of a bond received as consideration in a transaction which was being set aside was adequate restoration, even though the bond had become less valuable, or even unenforceable, by the running of the statute of limitations. This case, far from supporting Waialua, is direct authority for the proposition that a change in the value of the subject matter of the

sale or purchase does not alter the rule that the return of the subject matter satisfies the requirement with respect to restoration.

At page 65, *Holly v. Missionary Society* (1901), 180 U. S. 284, 45 L. Ed. 531: Here an attorney, who was an executor, misappropriated funds of the plaintiff, a client, and distributed them to the beneficiary of the estate, which was a charitable institution, in accordance with the decree of distribution. The beneficiary devoted the funds to the purpose for which they were left. The plaintiff thereafter sought to recover the moneys from the beneficiary, which had had no part whatsoever in the defalcation. The case decided only that there were no grounds for recovery and had nothing to do with status quo in the cancellation of instruments.

At page 65; *Grymes v. Sanders* (1876), 93 U. S. 55, 23 L. Ed. 798: Here the purchaser of a mine sought to set aside the purchase upon the ground of mistake, in that he believed that a shaft which he saw on neighboring property when he was inspecting the mine was in fact on the property which he purchased. The Court found (1) that the mistake was not a material one; (2) that the plaintiff did not seek to rescind promptly upon the discovery; (3) that it would not be convenient for the seller to return the purchase money which he had spent; and (4) that defendant was not at fault and stood on an equal footing with plaintiff. The case turns on the absence of grounds for rescission—not that it should be denied though grounds exist, because the aggrieved party could not restore.

At page 67, *Watson Coal & Mining Co. v. Casteel* (1879), 68 Ind. 476: This was an action for rent to which the lessee cross-complained for cancellation of the lease on the ground of fraud. A demurrer to the cross-complaint was sustained and affirmed on appeal, the Court saying at p. 482:

> "Nothing that has been received by the defendants under the lease has been returned or tendered to the plaintiff; and, as the defendant has had a full knowledge of the facts alleged for more than three years, the remedy of rescission has not been sought within a reasonable time."

The decision did not rest on the inability to restore.

At page 68, *Snow v. Alley* (1887), 144 Mass. 546, 11 N. E. 764: Here the plaintiff, a promoter and shareholder of the Postal Telegraph Company, induced the defendant to agree to advance funds to finance the company in return, among other things, for plaintiff giving the defendant certain bonds. The plaintiff alleged, and the jury in returning a verdict for the plaintiff found, that the defendant had promised to purchase additional bonds from the plaintiff and to lend him money personally. The defendant financed the Postal Company, but refused to buy plaintiff's bonds or lend money to him, and the plaintiff brought an action to recover the bonds given to the defendant. The judgment for the plaintiff was reversed, the Court saying that the plaintiff had not offered to restore, and that the defendant's requested instruction that "if it was impossible to restore the defendant to the position he occupied before the financing, plaintiff could get no relief", should have been given. It is to be observed

that there is no failure in the instant suit to return to Waialua everything with which it parted in consideration for the instruments cancelled. Beyond that, as we have heretofore shown[26], it is the rule in Massachusetts that the contracts of incompetents are void, and, accordingly, had the ground for rescission been incompetency in the *Snow* case, cancellation would have been directed by the Massachusetts Court.

At page 68, *Riggan v. Green* (1879), 80 N. C. 236, 30 Am. Rep. 77: Here plaintiffs, who were heirs of an incompetent grantor, brought an action to set aside a deed of property which had been resold to an innocent grantee. It was found that the transactions were both fair and that the price paid by the first purchaser and the second purchaser was adequate. The Court declined to grant relief because it said, at page 240:

> "Rescission of the deed would produce no benefit to the plaintiff if coupled with the duty and obligation to replace the defendant in status quo, whilst it would be a great inconvenience and an injustice to the defendants * * *."

This case is no aid in defining the term "status quo". It holds merely that where restoration would produce no benefit to the incompetent and at the same time would be a detriment to the innocent defendant, cancellation will not be ordered. This is obviously a correct conclusion. The later case decided in North Carolina, *Ipock v. Atl. & N. C. R. Co.* (1912), 158 N. C. 445, 74 S. E. 352, leaves no doubt that it is the law of North Carolina that when the incompetent can make restoration and still be advan-

26. See supra, fn. 14, p. 9.

taged in setting aside the transaction, relief will be granted to him.

At page 68, *Gill v. Dingfelder* (1923), 224 Mich. 247, 194 N. W. 974: Here the defendant, in consideration of the transfer to him of certain real property of the plaintiff, who was an elderly lady, paid her some cash, gave her his note for an additional sum, and promised to support her for life. A disagreement arose between them and plaintiff left defendant's home and sought to recover her property. She was not incompetent. It was held that rescission would be refused, but she was given judgment for the sum at which her future support had been valued in the transaction, namely, $3000. In denying relief for rescission, it was said that the defendant had spent $14,000 in making improvements on the property and that it was impossible for the plaintiff to restore the same. The case does not hold that reimbursement for the improvements and the consideration paid for the deed would not have effected restoration, but apparently that the plaintiff was not in a position to repay the sums.

At page 68, *Rice v. Wilson* (Dist. Ct. Del. 1915), 225 F. 159: This was an action to enjoin the transfer of shares by the defendant on the ground that they were the property of the plaintiff and had been procured by the defendant fraudulently. It was found that there was no fraud. Relief was denied and the only discussion of status quo is the following, at p. 163:

> "It is a general, though not universal, rule, that a court of equity will not rescind a contract even on the ground of fraud when the position of the par-

> ties has been so altered by reason of the execution of the contract in whole or in part that they cannot be restored fully or approximately to their original position and a rescission would work gross inequity * * *. It is, however, unnecessary to pursue the inquiry when, or under what circumstances, rescission of a contract may be declared and enforced by a court of equity on the ground of fraud; for on the proofs before the court * * * I am convinced that no fraud on the part of Wilson (the defendant) has been established."

There is no suggestion in the opinion that status quo could not have been restored. The case went entirely on the absence of a ground for cancellation.

At page 68, *Rickman v. Houck* (1921), 192 Ia. 340, 184 N. W. 657: Here the defense of incompetency was raised to an action for specific performance to sell real estate. The finding was that the defendant was not incompetent when the contract was made and the decision is placed on that ground. The Court said, at p. 348:

> "Since we reach the conclusion that it has not been shown that appellant's ward was incapable of making the contract involved in this case, it is not necessary that we proceed further in discussion of the case."

The Court then states it will, however, give its views on whether status quo would have been restored by merely returning the $500 paid for the property. Thereafter follows the language quoted by Waialua. It may be remarked that in the case at bar the restoration ordered is not just the return of the purchase price, but also

interest thereon and the full value of the improvements placed on the property by Waialua. As we will hereafter demonstrate, cancellation in this case will in no way disrupt Waialua's plantation activity.

At page 68, *Dent v. Long* (1890), 90 Ala. 172, 7 So. 640: Here heirs of a deceased grantor sought cancellation of a deed on the ground of incompetency and fraud. Payment for the property had been made in part by the exchange of other lands. The lands so received as consideration had been resold. It was found that the grantor was in fact competent and that no fraud had been practiced by the defendant. Beyond that, the Court pointed out that the plaintiff could not restore because the land which the defendant had transferred to the plaintiff in the exchange had been resold and it also added that the defendant had made valuable improvements to the land it had obtained from the deceased. The absence of a ground for rescission, namely, incompetency or misrepresentation, was the real ground of the decision. Had the grantor been incompetent it is clear that the deed would have been set aside, as it is the rule in Alabama that in such cases the instrument is void. (*Thompson v. New England Mortgage Securities Co.* (1895); 110 Ala. 400, 18 So. 315; *Galloway v. Hendon* (1901), 131 Ala. 280, 31 So. 603.)

At page 69, *Piedmont Land & Imp. Co. v. Piedmont Foundry & Machine Co.* (1892), 96 Ala. 389, 11 So. 332: Here the plaintiff, who was largely interested in the property and affairs of a small town, deeded a parcel of property and gave money to the defendant in return for which the defendant agreed to develop an enterprise in

the neighborhood. Construction was started, but the defendant became financially embarrassed and did not complete it. Plaintiff sought to obtain rescission and reconveyance on the theory of a resulting trust. The Court found that there had been no fraud, but only a breach of contract by the defendant, and denied the relief sought, pointing out that the plaintiff's remedy was for damages. It also stated, at page 394, that "it would not be practicable for the parties to be put in the situation they occupied when the contract was made" since the defendant had erected a plant and gone forward part way with its development as agreed, and the plaintiff in turn had secured some benefit from this in its effect on the plaintiff's other interests in the community. Here again no ground for cancellation existed. A similar case is *Buckner v. P. & G. E. Railroad* (1890), 53 Ark. 16, 13 S. W. 332, cited by Waialua at page 68. So far as any question of status quo is concerned, these two cases emphasize that it is largely a question of fact in each case for the trial Court to find whether it is practicable under the circumstances to effect a substantial restoration. Had the grantors in either of these cases been incompetent, cancellation would have been decreed, since both in Alabama (*Thompson v. New England Mortgage Security Co.*, supra, p. 29) and in Arkansas (*McEvoy v. Tucker* (1914), 115 Ark. 430, 171 S. W. 888, the contracts of incompetents are void.

The cases relied on by Waialua, we submit, are no aid in the determination of the meaning of the term "status quo" as used in the rescission cases to denote the condition to which the parties should be restored in setting

aside a transaction. For the most part, they turn on the absence of grounds in the particular case for rescission and any discussion of status quo is mere dictum. It is in the cases in which the ground for cancellation is established, be it fraud or incompetency or some other ground, that the Court's consideration of the question of status quo becomes vital and authoritative. Those cases were set out at pages 17 to 21 in our opening brief.

The death of the incompetent's father in 1922, after the purchase, with the consequent vesting of the incompetent's remainder, is no bar to restoration.

Waialua next argues (p. 70) that restoration cannot be effected in this case because after the purchase the incompetent's father died and her title ripened into a fee. In substance, the argument is that since the death of a third party has increased the value of the incompetent's interest that it, Waialua, should have this unearned increment rather than the incompetent, to whom it would belong but for the questioned instruments. Waialua says (p. 78):

> "Assuming that an equitable right of rescission arose by reason of the incompetency * * * that equitable right is lost upon the happening of the contingency upon which the estate depends."

As we will show, Waialua cites no cases in America or in England, and we know of none, which so hold.

Waialua directs the Court (p. 71) to the following authorities to support its argument:

1. *Grymes v. Sanders* (1876), 93 U. S. 55, 23 L. Ed. 798, wherein relief was denied a purchaser of a mine who

sought rescission on the ground of mistake, the Court holding, among other things, that the mistake was not a material one, and accordingly no ground for cancellation existed.

2. *Molton v. Camroux* (1848), 2 Exch. 487, 4 Exch. 17, wherein relief was denied an incompetent's estate, which sought, on the ground of incompetency, to recover the cost of an annuity purchased from the defendant insurance company by the deceased, the Court holding that in England an incompetent's contract will not be set aside if it is fair, regardless of the question of status quo. This case has already been discussed (supra, pp. 18-20) in detail. While it declares the English rule on the validity of incompetents' contracts, it by no means supports the proposition contended for in this portion of Waialua's brief. It was not the incompetent's death that cut off a right of rescission in this case, but, on the contrary, such a right under the English law never existed.

3. *Atlantic Delaine Co. v. James* (1877), 94 U. S. 207, 24 L. Ed. 112; wherein relief was denied to a creditor who had made a settlement with his debtor and who sought rescission on the ground that the financial statements furnished him by the defendant were untrue. The Court, at page 214, said:

> "The fundamental averment of fraud is not sufficiently sustained * * *. The bill must therefore be dismissed."

There is no suggestion in this case that relates to Waialua's point under discussion.

4. *Breed v. Judd* (1854), 67 Mass. (1 Gray) 455; wherein an infant was denied relief from a contract con-

sidered fair, the Court declaring that to make the defendant whole the plaintiff would be required to compensate him for a risk which he had assumed. Whatever may be the law of Massachusetts with respect to infants' contracts, contracts of incompetents, in that state, stand on an entirely different basis. Contracts of incompetents are there held to be void regardless of the ability of the incompetent to make restoration. (*Seaver v. Phelps* (1831), 11 Pick. (Mass.) 304, 22 Am. Dec. 372; *Brigham v. Fayerweather* (1887), 144 Mass. 48, 10 N. E. 735; and *Cleaveland v. Malden Savings Bank* (1935), 291 Mass. 295, 197 N. E. 14.)

5. *Mutual Life Insurance Co. v. Smith* (1911), 184 Fed. 1, wherein relief was denied the trustee of the bankrupt's estate who sought to recover the purchase price of an annuity upon the ground that the bankrupt, in paying for the policy, had made a transfer of his funds in fraud of his creditors. There was no charge of fraud against the defendant insurance company, and the Court found no ground for rescission. The question of the ability to restore to status quo was not involved in the actual decision and the Court did not pass upon it.

6. *Williams v. Penn Mutual Insurance Co.* (D. C. Fla. 1925), 6 Fed. (2d) 332; (C. C. A. 5, 1928), 27 Fed. (2d) 1; wherein relief was denied in an action brought to set aside releases given by beneficiaries of the policies to the insurance companies after the death of the insured upon the ground of fraud upon the part of defendant's agent in procuring such releases. The Circuit Court of Appeals (27 Fed. (2d) 1), in affirming the dismissal of the bills, rests its decision not upon the question of status

quo, but (a) that the plaintiff did not rely upon the alleged misrepresentations, (b) that the proof did not sustain the bill on the allegations of fraud, and (3) that the plaintiffs were guilty of laches. If the decision rested, as Waialua suggests, on the ground that the defendant, if the releases were cancelled, would under the terms of the policy have lost its right to defend for fraud in procuring the policies because of the lapse of time, the decision would in no way support the proposition contended for. Waialua has lost no rights by virtue of the death of the incompetent's father and the vesting of the incompetent's title.

If the argument, that the death of the incompetent's father cut off all rights she might otherwise have had to set aside the instruments, were sound, then no owner of an expectancy would ever be accorded relief from his bargain after the death of the party upon whose life it depends. Relief has, of course, been granted many times in such situations.[27] The same argument was advanced in the English case of *Nott v. Johnson & Graham* (1687), 2 Vern. 26, 23 E. R. 627, wherein the contingency occurred ten years after the purchase, and in an action to set aside the bargain the purchaser's argument that he should be protected because he bore the risk that the seller would not outlive the holder of the life estate was not accepted.

The fact that the incompetent in the instant case, upon the cancellation decreed by the Circuit Court of Appeals, will receive a vested title while she conveyed only a con-

27. Opening brief Eliza R. P. Christian, pp. 24 to 28 and cases cited footnote 10, p. 25; *McKinney v. Pinckard* (1830), 2 Leigh (Va.) 149, 21 Amer. Dec. 601; *Boynton v. Hubbard* (1810), 7 Mass. 112.

tingent one, this improvement in her title not being due to anything contributed by Waialua but being an additional value created without any participation by Waialua, does not prevent restoration to status quo within the meaning of the rule.[28]

Waialua's assumption of the risk that the incompetent would predecease her father is no impediment to restoration. There are many cases in which, although defendant insurance companies have taken a risk which has turned out advantageously to them, their policies are nevertheless canceled by the insured where grounds exist therefor.[29] As said in one of them,[30]

> "It is true that in the years elapsing since the exchange defendant, by the death of Green, might have been called on to pay under the new policy, but as a matter of fact it has not and the defendant's situation has not changed, but even if it has, whose fault is it? Certainly not the plaintiffs."

So in the instant case we need not speculate about Waialua's troubles if the incompetent had died before her father. She did not; she is still alive and her father is dead. Waialua is in no way injured by the happening of the event—and restoration cannot mean resurrection.

28. *Dermott Land & Lbr. Co. v. Zelnicker* (C.C.A. 8, 1921), 271 Fed. 918, cert. den. 257 U. S. 648, 66 L. Ed. 415, wherein it was held to be unnecessary to effect restoration, for the plaintiff, who was a purchaser under a contract with the defendant calling for periodic deliveries, to return a profit made by him upon a resale of some of the material.

29. *Maupin et al. v. Missouri State Life Ins. Co.* (Kansas City Ct. Apps., Mo., 1919), 214 S. W. 398; *Green v. Security Mut. Life Ins. Co.* (1911), 159 Mo. App. 277, 140 S. W. 325; *Bank Savings Life Ins. Co. v. Steiner* (Texas Civ. Apps. 1935); 81 S. W. (2d) 225; *McCarty v. N. Y. Life Ins. Co.* (1898), 74 Minn. 530, 77 N. W. 426.

30. *Green v. Security Mutual Life Ins. Co.*, supra, note 29 at page 298.

If the proposition advanced by Waialua were the law, it would also operate to bar an insurance company from contesting the validity of an insurance policy obtained through the misrepresentation of an assured who had died, if it be a life policy, or who has been disabled, if the policy contained a disability provision. The insured, or if it be a death policy the beneficiary named, can say in such a situation that a risk has turned out to his benefit, that he has won his advantage and that therefore he cannot be restored to status quo upon a cancellation of the instrument. He can point to this "fortuitous circumstance", as Waialua refers to the death of the incompetent's father (p. 70), as a bar to an action for cancellation, just as Waialua has here. The insurance company, of course, cannot bring the dead man back to life, or perhaps cure the disability, to effect restoration, any more than the incompetent can bring her father back to life to reduce her estate from a vested to a contingent one. The law does not require it. *Enelow v. New York Life Ins. Co.* (1935), 293 U. S. 379, 79 L. Ed. 440, wherein it was held that the affirmative equitable defense that the policy had been obtained by the misrepresentations of the insured was open to the insurer after the death of the insured in an action at law brought upon the policy. *American Life Insurance Co. v. Stewart* (1937), 300 U. S. 203, 81 L. Ed. 605, wherein it was held that the insurer might after the death of the insured maintain a bill in equity to cancel the policy on the ground that it had been obtained through misrepresentations of the insured.

We refer to our opening brief (p. 17, fn. 6) for the authorities defining the term "status quo" and submit that there is no force in Waialua's argument that status

quo cannot be restored here because the incompetent's title vested upon the death of her father after the purchase and before the commencement of the action. We repeat that fact in no way prejudices Waialua.

Waialua cites (pp. 46, 47, 54, 56) several text writers[31] in support of its contention that the objective theory of contracts operates to supply the lack of understanding of an incompetent and hence make his contracts valid. These authors, of course, advance no such proposition. The sections of their works referred to have nothing to do with incompetency cases. They deal with the expressions of competent persons upon which others rely in making a bargain. We refer to the portions of their several works dealing with incompetents' contracts[32] for a more accurate recital of their views on the instant subject.[33]

Waialua also cites (pp. 66, 72) text writers[34] to support its view that restoration in this case, which admittedly is one involving incompetency on the part of the grantor,

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31. *Williston on Contracts* (Rev. Ed. 1936), Vol. I, Secs. 20, 21, 22; *Holland, Jurisprudence*, 12th Ed., pp. 119-120; *Langdell, Summary of the Law of Contracts*, 2d Ed., Sec. 180; *Holmes, The Common Law*, pp. 309, 324, 325; *Story, Equity Jurisprudence*, 13th Ed., Sec. 227.

32. *Holland, Jurisprudence*, 13th Ed., p. 119; *Williston on Contracts*, op. cit. supra, n. 26, Sec. 254, at p. 750; *Langdell, Summary of the Law of Contracts*, 2d Ed., Sec. 180. At page 244, Langdell states, "The law, however, makes this intendment only for purposes of justice and convenience, and therefore it will never make it when the actual existence of the mental act would be impossible. Hence the death or insanity of an offerer during the pendency of his offer makes it impossible to complete the contract for want of a concurrence of wills."

33. It should be noted that the quotation, at page 54 of Waialua's brief, of a part of Sec. 254 of *Williston on Contracts* (Rev. Ed.) is so incomplete as to give an inadequate and incorrect impression of the learned author's views. The passage quoted omits several lines, indicated by asterisks. The omitted portion states, in effect, that *Molton v. Camroux* is not in accord with earlier decisions in English courts of law. Moreover, a reading of all the sections of *Williston* dealing with the subject, including those preceding and those following Section 254, will dispel any thought that the author considers the weight of American authority to be in accord with the English rule as laid down in the *Molton* case.

34. *Pomeroy, Equity Jurisprudence*, Vol. V, 4th Ed., Sec. 2110; *Restatement of the Law of Contracts*, Vol. II, Sec. 486.

means replacing the other party exactly where it was before the bargain was made. Again, it must be pointed out that these authors were not discussing incompetency cases but mistake cases where both parties are on an equal footing in the eyes of a Court of Equity. We refer to the sections of these works dealing with the instant problem.[35] That "status quo" means substantially or approximately the condition formerly occupied, and in incompetency cases it refers more particularly to requiring that the incompetent return what he received in the bargain to the best of his ability, is without question the prevailing rule.[36] As said in *Black on Rescission and Cancellation*,[37] at page 1484:

> "But the rule does not mean that there must be an absolute and literal restoration of the exact previous condition, but such a restoration as is substantial without material difference, and reasonably applicable, or, when fraud is involved, as nearly complete as the fraud of the opposite party will permit."

The incorporation of the land into the Waialua plantation does not prevent restoration to status quo.

Waialua devotes upwards of 18 pages of its brief[38] to a detailed description of the Waialua plantation, with the apparent purpose of demonstrating that it is a large profitable undertaking, a principality in fact. The fact is not disputed, but we definitely disagree with the conclusion which counsel draw that because thereof restoration can-

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35. *Pomeroy, Equity Jurisprudence*, Vol. II, 4th Ed., Sec. 946, et seq.; *Restatement of the Law of Contracts*, Vol. II, Sec. 349; *Story, Equity Jurisprudence*, 14th Ed., Secs. 314 to 324, especially Secs. 320, 321 and 322.

36. Opening Brief of Eliza R. P. Christian, pp. 16 to 23.

37. Black on Rescission and Cancellation Vol. III, 2d Ed., Sec. 616.

38. pp. 20-25; 31-34; 78-89.

not be effected in this case—a fact found against Waialua's contention by all three lower Courts.

The so-called "Waialua Plantation" comprises about 49,000 acres. This area is not, however, all operated by Waialua. Over 12,000 acres thereof (R. 507, 1493) are leased by Waialua to the Hawaiian Pineapple Company, which carries on its own operation in pineapple culture, paying rent to Waialua. 6476 of the 12,000 acres so leased to the Hawaiian Pineapple Company lie in the Holt tract. Of the remainder of the acreage embraced in the Waialua Plantation, namely 37,000 acres, only 7474 acres are in the Holt tract. Of this 7474 acres, only 1623 are actually cultivated by Waialua as a part of its whole plantation. This is the sugar land, which is 16% of the area actually farmed by Waialua in its sugar plantation operation. The incompetent's interest is an undivided one-third thereof, or the equivalent, in terms of acres, of 5⅓%. It is on the sugar land operated by Waialua that *practically all* the improvements made by Waialua are located. This Waialua admits in its brief, at page 80, where it says:

> "With the exception of the partial use of a plantation railroad and some of the roads which are used to reach the pineapple area, all of the improvements on the Holt land are used in connection with the cultivation, irrigation and transportation of sugar cane—that is, in connection with sugar and not with pineapples."

There is no question raised that the incompetent is not restoring to Waialua everything she obtained from it as consideration for the execution of the questioned documents. If we assume (contrary to the findings, Supreme Court R. 294, 301; trial Court R. 518) that she received the

$30,000 paid for the deed, still the decree of the Circuit Court of Appeals provides without question that Waialua will receive back everything the incompetent obtained from it. She has received nothing from Waialua for or under either the lease or the 1906 contract. Whatever maintenance she has been provided with because of the 1906 contract has come from Annie Kentwell, not Waialua, and Annie Kentwell has not appealed from the judgment. Waialua's only complaint on the question of restoration is that it, Waialua, even though it gets back all with which it parted, is inequitably dealt with in cancelling the agreements because the conduct of its enterprise will be seriously hampered. This is not true, as we will demonstrate and as the three lower Courts, in cancelling the documents, have found.

Waialua's possession and plantation operation will not be disturbed by the decree.

As heretofore shown (supra, p. 39), the Holt tract is only a part of the Waialua plantation. The area of the Holt land operated by Waialua is about 16% of its own plantation enterprise. The incompetent owns an undivided ⅓ interest therein, or 5.2%. The interest of the incompetent is only an undivided 9/27ths in the Holt area. Waialua itself has purchased 16/27ths from other Holt heirs and holds a long term lease on the other 2/27ths, and accordingly, a recovery by the incompetent will leave Waialua as the owner or lessee of an undivided two-thirds interest *and as a tenant in common in possession of the whole of the Holt tract.* Waialua's ownership of the 16/27ths and the lease of 2/27ths is not challenged in any way. Its right to possession of all of the Holt tract, with the improvements, is not challenged in any way. It may

continue its plantation operation with all the physical advantages it had in the past. It will, of course, be required to pay rent to the incompetent as it is now paying rent to the owners of the outstanding 2/27ths interest which it has under lease, but that fact in no way disturbs the operation of the "unified plantation", with its interlocking roads, water system and railways. We may point out that there is no claim by Waialua that its occupation of the Holt area has not been a profitable one. There is no claim that the enterprise will be crippled for lack of finances if it must pay rent to the incompetent for occupation of the property which it thought it had purchased. It appears from the record that Waialua has built this enterprise largely out of the profits made from this plantation (R. 1272-1278). It admitted at the trial that even after charging off the improvements to expense, there was a profit for each year. We fail to see any inequity in requiring a co-tenant who wishes to occupy the land to the exclusion of the other co-tenant to pay a reasonable rental therefor, and *this is all that the decree of the Circuit Court of Appeals exacts from Waialua.*

The possible result of a subsequent partition.

The decree attacked restores the incompetent's one-third interest, and she then will be a tenant in common with Waialua of the Holt area. She or Waialua will then have a right to seek partition of the property if either of them wishes to divide their interests. A reference to Exhibit S-3 (original transmitted with record, R. 838), a copy of which is attached to Waialua's opening brief and which consists of a map of the plantation, will show the division of the area into sugar and pineapple lands, respectively.

The sugar land is colored yellow and the pineapple land is colored red. As heretofore stated, 6476 acres of the Holt land are pineapple lands, and 1623 acres of the Holt land are sugar lands. The remainder—about 5851 acres—consists of waste, forest or water lands. All of the pineapple lands are leased to the Hawaiian Pineapple Company under a long term lease. The incompetent through her guardian has ratified this lease (R. 536) and its validity is not involved and cannot be questioned. All of the improvements made by Waialua, both on and off the Holt lands, to develop its vast enterprise, have been made either on the sugar area itself or on land owned by Waialua and not involved in this action. With minor and inconsequential exceptions, the whole $1,000,000 Waialua talks about having spent was spent for improving property other than the pineapple area. Under the law of Hawaii (Revised Laws of Hawaii, 1935, Sec. 4736), the Court may, in a partition suit, take account of the fact that one co-tenant has placed improvements on the property and

> "* * * set apart any particular portion or portions of land to any particular party or parties who by prior occupation or improvements or otherwise may be equitably entitled thereto, to make proper adjustments for equalization thereof by sale of other portions and the application of the proceeds for such purpose, or as a condition of any such partial allotment to require payment by such parties of any value of the portion so set apart to them in excess of their proportionate interest in value of the whole property * * *."

The decree attacked requires the incompetent to pay Waialua one-third of the value of all the improvements placed on the property since the date of the deed and

prior to the demand upon which this action was predicated, in addition to repaying the purchase price with interest. A reference to Exhibit S-5 (R. 1507) will show that at cost the amount to be paid for improvements (including those abandoned) will be, roughly, $150,000. The repayment of the purchase price, with interest as directed, will be in excess of $80,000. The total payment to be made by the incompetent to Waialua, if the value to her land of her share of the improvements thereon should approximate their cost, will be in the neighborhood of $230,000. She will then have an undivided one-third interest in the whole Holt tract, both land and improvements. Should a partition suit be brought in the future, it is entirely within the realm of possibilities that the Hawaiian Court would, under the statute which gives it broad powers, make an allotment to the incompetent of her one-third of the lands entirely from the pineapple area. One-third of the entire Holt area would be a little less than 4700 acres. There are, as stated, about 6500 acres of pineapple land. From the rental values fixed for these respective areas by the trial Court (sugar land $14 per acre, R. 173; pineapple land $15 per acre, R. 167, 508, 522)—and Waialua has raised no question of the correctness of these findings in any Court—it would appear that the per acre value for the two types of land is about the same. It would, of course, be necessary to compensate the incompetent in land or money for her share of the improvements on the sugar area which she will have paid for under the decree, but there is both adequate land and money for this to be done. Waialua having made its vast development on the sugar lands or on its own lands for use on the sugar lands, such a division *would*

not in any way disturb its plantation operation. Nor would it disturb the Hawaiian Pineapple Company, which, as stated, holds a lease on the pineapple area, since that lease has been ratified and approved in this case by the incompetent's guardian. It would mean only that the incompetent, and not Waialua, would receive the rents thereafter paid under that lease for her share of the property.

The restoration awarded has been complete.

We submit that not only has the decree effected restoration completely, but under the law of Hawaii Waialua is fully protected from any exercise by the incompetent, in an inequitable manner, of the rights restored to her. It must be assumed that a Court of Equity in a subsequent partition suit would do the just and proper thing. It might not believe that the division which we have referred to was proper and we do not wish to be understood as saying that complete equity could be done to the incompetent by such a division. That is for the Hawaiian Court to decide if and when the question arises. All we do say is that it lies well within that Court's power, in dealing with a division in this case, to leave Waialua's plantation operation completely untouched. There is no force, therefore, in Waialua's attempt to paint its plantation as a vast integrated domain that would all but crumble if the instruments were all canceled upon the terms directed by the Circuit Court of Appeals.

Waialua's contention with respect to restoration of status quo, when analyzed, comes merely to this: That, if the transactions are now set aside, Waialua, although fully reimbursed for everything that it has paid to or for

the incompetent, will lose the benefit or profit of its bargain. But it is not entitled to that benefit if the bargain itself cannot stand.

Inaccuracies in the discussion regarding the plantation development.

Before concluding the reply to this section of Waialua's brief dealing with the plantation development, we desire, for the purpose of accuracy, to correct certain of the statements and inferences made by Waialua concerning this subject, and therefore make the following comments:

1. Waialua, at page 22, refers to Exhibit S-3, the map attached to its brief, as being drawn to scale and depicting the Waialua property and the Holt land. In fact, the map does not show all of the Waialua plantation of 49,000 acres, but only a part of it, and thereby the Holt land enclosed in heavy green lines appears to be the greater portion of the plantation. In fact, the Holt land is only 14,000 acres out of a total of 49,000—about 28% of the whole. (Waialua Op. Br. p. 23.) The exaggeration might be confusing in considering the question of status quo, and we therefore point it out.

2. Waialua states, at page 31, that it "increased its work of improvement * * * after the death of Mrs. Christian's father in 1922". There is no support for this statement in the record if it is meant to imply that the rate of expenditure for improvement was increased relying on the title purchased from the incompetent. The record shows (Exh. S-5; R. 1507) that the average annual expenditure before Waialua bought the incompetent's interest, and after it took possession under the 1905 lease, was about $36,000, and that the average annual expendi-

ture after it bought the interest to the date of the demand upon which this suit was brought was about $25,000.

3. In reciting the cost of the improvements made, Waialua, at page 32, and again at page 79, refers to the Wahiawa Reservoir and Ditch, and the impression is created that the expenditure for this improvement was made on the strength of the purchase from the incompetent. This is not so. Its own testimony (R. 1242) is that the reservoir was originally completed in 1906. It could hardly have been relying on the purchase from the incompetent in 1910 of an undivided one-third interest in the Holt land in making this expenditure, which was made on a parcel of property lying outside the Holt area. Incidentally, the Wahiawa Dam was in course of construction before the lease of 1905 was made (R. 1242, 1515), and so this enterprise can hardly be said to have been undertaken in reliance on the lease.

4. Waialua states, at page 36, that it made a lease in 1923 to the Hawaiian Pineapple Company covering some 6476 acres of the Holt land, believing that it was the owner of the incompetent's one-third interest. If this statement is designed to suggest that this lease is an impediment to restoration to status quo, there is no merit in it because the incompetent has in this suit elected to ratify and adopt that lease (R. 536). The Hawaiian Pineapple Company will in no way be disturbed. As to the further suggestion that Waialua purchased a one-third interest in the Hawaiian Pineapple Company believing it owned the incompetent's undivided one-third interest in the Holt land, the record will show (R. 518) that the incompetent attempted to trace the funds obtained by

Waialua in the form of a paid-up rental from the Hawaiian Pineapple Company for this lease and to accept the incompetent's proportion of these shares instead of her proportion of the paid-up cash rental. Waialua successfully resisted this attempt before the trial Court. Apparently Waialua considered it had made a good trade in buying shares of the Hawaiian Pineapple Company with its paid-up cash rental; otherwise it would have been glad to let the incompetent have her share in stock instead of cash.

5. Waialua states, at page 37, that the twenty-two persons listed at page 977 of the record would have given "valuable testimony" in this case, but that they were dead or otherwise unavailable at the time of trial. The stipulation to which reference is made is merely that the named persons "who otherwise might have been witnesses", were unable to testify (R. 976). There is no agreement, or evidence, that their testimony would be valuable.

6. Waialua, at page 36, states that it abandoned improvements costing $16,800 to make the lease to the Hawaiian Pineaple Company. It fails to state that it made a fair lease, which the incompetent has been glad to ratify. It by no means lost on the transaction, and under the decree of the United States Circuit Court of Appeals, if the trial Court believes that the improvements enhanced the value of the Holt land the incompetent is required to pay her share thereof.

7. Waialua refers, at pages 37 and 38, to missing documents. Some of them are referred to apparently to cast doubt on Eliza Christian's incompetency. This, how-

ever, is now conceded by Waialua. As to the writings having to do with this case, it is quite interesting to realize that in large part the transaction involving the 1910 purchase, including a copy of the agreement between Castle and Holt dated April 15, 1910, providing that Holt should undertake the purchase of the incompetent's share for Waialua, was developed from documentary evidence obtained on subpoena from Waialua's own files (R. 905, 1011).[39] Surely these documents must have been authentic, since they were obtained from Waialua's own records.

8. Waialua, at page 79, states that it is obvious that it would not have made the improvements on the Holt land if it had not believed it owned the incompetent's undivided one-third interest. It is not obvious at all, or perhaps even the truth, because regardless of the questioned instruments Waialua was a co-tenant in possession during the period up to 1922, holding a lease on or owning, independent of the incompetent's interest, the complete existing interest in possession, and from 1922 to the date of the commencement of the action holding under lease or owning, independent of the incompetent's interest, an undivided 18/27ths interest. Having such title and such rights in possession, it is, we submit, not at all obvious that they would not have developed the property, but, on the contrary, we believe it is obvious that they would have been interested in improving it.

9. Waialua, at page 89, refers to the cost of clearing the land. This was done prior to the date of the deed of 1910 and pursuant to the terms of the lease of 1905, and

39. See Opening Brief of Eliza R. P. Christian, at pp. 30 to 47.

Waialua has had the benefit of occupying the land and using it in its cleared condition for the whole of the lease term, which expired in 1930.

The fluctuation in land values is no impediment to cancellation.

Waialua contends, at pages 89 to 96, that the land has increased in value and that this fact makes it impossible to effect restoration. We do not doubt that land values in Hawaii, as elsewhere, have increased since 1910. Moreover, as heretofore pointed out, the improvement in the incompetent's title by the death of her father in 1922 has, of course, increased the value of her interest. There is, however, no support in the record, or out of it, so far as we know, for Waialua's statement that "her counsel says (it) is worth millions". The Supreme Court of Hawaii (R. 294), as Waialua points out, decided, and correctly, that fluctuations in values of the subject matter of a sale is no impediment to restoration on cancellation.[40]

In support of its argument, Waialua cites several cases.[41] Such of these cases as touch the question of changing values turn upon the proposition that the recovery is barred by laches. As we pointed out earlier in the brief (supra, p. 5), all question of laches is out of this case for two reasons: (a) that laches is a question of fact,[42] which has been decided in favor of the incompetent by

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40. *Neblett v. Macfarland* (1876), 92 U. S. 101, 23 L. Ed. 471; *Cohen v. Ellis* (1885, N. Y.), 16 Abbott's N. C. 320.
See also: *Felt v. Bell* (1903), 102 Ill. App. 218, 68 N. E. 794.

41. *Felix v. Patrick* (1892), 145 U. S. 317, 36 L. Ed. 719; *Wetzel v. Minnesota R. R. Transfer Co.* (1898), 169 U. S. 237, 42 L. Ed. 730; *Grymes v. Sanders* (1876), 93 U. S. 55, 23 L. Ed. 798; *Capps v. Clark* (1923), 196 Iowa 758, 195 N. W. 372; *Hanner v. Moulton* (1891), 138 U. S. 486, 34 L. Ed. 1032; *Twin-Rock Oil Co. v. Marbury* (1876), 91 U. S. 587, 23 L. Ed. 328.

42. *Townsend v. Vanderwerker* (1895), 160 U. S. 171, 40 L. Ed. 383.

each of the three lower Courts (trial Court, R. 157-8; Supreme Court of Hawaii, R. 308; Circuit Court of Appeals, R. 1605); and (b) the point was not made in Waialua's petition for certiorari. To this we add that laches *never* operates against an incompetent,[43] and Eliza Christian admittedly has been incompetent all of her life.

The cancellation of the lease of 1905 presents no difficulties with respect to restoration.

The substance of Waialua's argument (pp. 96 to 102) is that since the lease was fair and Waialua had no knowledge of the incompetency, cancellation should not be ordered. From the facts within the record, we accept the statements that the lease was fair, and that Waialua did not have knowledge of the incompetency when it made the bargain in 1905. However, we do not concur in the conclusion of law that Waialua reaches. It is again asking for the application of the English rule to the exclusion of the whole body of American common law. The quotation (pp. 98-99) from the opinion of the Supreme Court of Hawaii shows clearly that that Court applied the English rule in so far as the lease was concerned. The important question is not whether the lease was fair, but, Eliza Christian being incompetent, whether status quo within the meaning of the term can be restored in its cancella-

43. *De La Nux v. Houghtailing* (C.C.A. 9, 1921), 269 Fed. 751; *Bradley v. Singletary* (1912), 178 Ala. 106, 59 So. 58; *Taylor v. Colley* (1912), 138 Ga. 41, 74 S. E. 694, 696 et seq.; *People v. Johnson* (1914), 161 App. Div. 625, 146 N. Y. S. 977, 979; *Holman v. Randolph Nat. Bank* (1924), 98 Vt. 66, 126 Atl. 500, 502; *Van Buskirk v. Van Buskirk* (1893), 148 Ill. 9, 35 N. E. 383, 386; *Crowther v. Rowlandson* (1865), 27 Cal. 376; see also: *Pomeroy's Equity Jurisprudence* (4th Ed.) § 1451; 6 *A. L. R.*, at p. 1689; *Hervey v. Rawson* (1895), 164 Mass. 501, 41 N.E. 682; *Finney v. Speed* (1893), 71 Miss. 32, 14 So. 465; *Bourne v. Hall* (1872), 10 R. I. 139; *Funk v. Wingert* (1919), 134 Md. 523, 107 Atl. 345, 6 A. L. R. 1686; *Wolf v. U. S.* (S.D. N.Y. 1935), 10 F. Supp. 899; *Shambegian v. U. S.* (D.R.I. 1936), 14 F. Supp. 93.

tion. As heretofore pointed out, all three Courts so found, and it appears clearly that they were correct.[44] Waialua paid nothing to the incompetent for or under the terms of the lease. Her title was merely contingent until 1922, and before that date the 1910 deed was obtained from her. The lease term had about two years to run when the suit was filed in 1928. It had expired before the entry of the judgment of the trial Court in 1932, from which judgment the appeals were taken which have now reached this Court. Waialua then has had possession of the property for the full twenty-five years of the lease term. The only changes which are brought about by cancellation is that Waialua must pay as rental for the incompetent's interest the fair value of its use and occupation for the period of her ownership, namely, 1922 to 1930, instead of the rental called for under the lease. Waialua, in turn, is relieved of its commitment to the incompetent in the lease (R. 376-377) that all of the improvements placed on the Holt tract become the property of the lessors at the expiration of the lease in 1930. Restoration, as it relates to the lease, is simple.

Waialua suggests, at pages 100 and 101, that the incompetent seeks only to cancel a part of the lease as it relates to her, and cites *Goin v. Cincinnati Realty Co.*, 200 Fed. 252, as authority that she cannot do so. Waialua's premise is incorect, so its conclusion must fall. The incompetent seeks to cancel her commitments to Waialua, and Waialua's commitments to her under the lease in their

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44. The trial Court, with respect to the lease as well as the deed and the agreement of 1906, said (R. 526): "It is the conclusion of this court * * * that the equities in the case at bar are in favor of ordering a cancellation of * * * the lease of 1905 * * *. Substantial adjustment of the status quo is possible under the facts."

entirety. The decree of the trial Court and that of the Circuit Court of Appeals in directing a cancellation of the lease as to the incompetent sets the document aside completely. There is no force in Waialua's contention.

Cancellation of the 1906 contract presents no difficulties with respect to restoration.

Waialua argues, at page 102, that the 1906 contract was beneficial to the incompetent and that in cancelling it "no attempt is made to restore status quo". It will be noted that Waialua does not claim that the other contracting party was ignorant of the incompetency. The finding, which is confirmed by both Appellate Courts, is that Annie Kentwell, to whom this agreement ran, knew of Eliza's incompetency when she made the contract (R. 482-3; 491; 573; 1609). Clearly, the instrument is void. (*Kendall v. Ewert* (1922), 259 U.S. 139, 66 L. Ed. 862; *Kailikia v. Hapa* (1901), 13 Haw. 459.)

With respect to restoration, the only consideration received by the incompetent for or under this document was support from Annie Kentwell. Waialua does not claim that it provided any such consideration. The incompetent's liability to restore upon cancelling this agreement would, as the Circuit Court of Appeals pointed out (R. 1610) be to Annie Kentwell, if to anyone—not to Waialua. So far as Annie Kentwell is concerned, the judgment is final as to her and she is not complaining. The 1906 instrument cannot stand for two reasons: (1) it was made with one who had knowledge of the incompetency and is therefore void. Waialua accordingly took nothing thereunder (*German Savings & Loan Society v. DeLashmutt* (1895, 67 Fed. 399), and (2) even though it were not

void, but only subject to being set aside upon the incompetent effecting restoration, nothing passed from Waialua to the incompetent thereunder and the incompetent's duty to reimburse Annie Kentwell is not Waialua's concern and beyond that is out of the case.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS AMPLY SUSTAINED ON VARIOUS GROUNDS.

ANSWER TO WAIALUA'S POINT III.

In the brief in opposition to Waialua's petition for certiorari, three points, not two, were made in support of the decision upon grounds in addition to those upon which it was placed. They were: 1. That Waialua, through its agent Holt, had knowledge of the incompetency; 2. That the price was inadequate and that it was not received by the incompetent; and 3. That the questioned instruments were nullities. Waialua now seeks to answer the first two points. We accordingly confine our reply to those propositions.

Waialua, through its agent Holt, had knowledge of the incompetency in making the purchase of 1910.

Waialua states, pages 103-104, that in advancing this proposition we seek to overthrow the findings of the lower Courts. This is not correct. In our brief we rested our argument squarely on the findings, coupled with Waialua's stipulation made at the trial. Our only criticism of the lower Courts was, and is, that they failed to apply a recognized principle of law to the facts either admitted or found and abundantly supported by the record. The view expressed by the Supreme Court of Hawaii that Waialua did not have knowledge of the incompetency,

which was accepted by the Circuit Court of Appeals (R. 1605) is inconsistent with the conclusion of law which must follow from the findings of specific facts. The view of the Circuit Court of Appeals on the point is more accurately expressed in its opinion denying Waialua's petition for rehearing when it said (R. 1637):

> "Our opinion was reached on the assumption that the company did not have such notice. We treated it in that manner because both the court below and the trial court required restoration of the amount paid. This could not have been made under any theory of the law other than that the company did not have notice."

We will not repeat the argument made in our opening brief (pp. 30-47) that Holt was Waialua's agent, that he knew of the incompetency and that Waialua therefore had notice of the incompetency, but refer to that portion of our brief wherein the record is carefully referred to and the authorities collected. This is not a "technical" point, as Waialua suggests, unless that term is used to mean one legally sound. It stands on the well-established proposition that a principal cannot claim the benefits of his agent's acts and at the same time escape their burdens. (*Veazie v. Williams* (1849), 8 How. 134, 12 L. Ed. 1018.)

Waialua is not entirely accurate in saying (p. 105) that the trial Court interpreted its decision to include a finding that Waialua had no knowledge of the incompetency. The trial Court interpreted the remand order of the Supreme Court of Hawaii to foreclose the issue because that Court's finding was that Waialua did not have knowledge (R. 1478, 1479).

As to the burden of proof, we stand upon the cases cited in our opening brief.[45] It should not be forgotten that in addition to being incompetent Eliza Christian was selling an expectancy, and it is the rule, even in England, that the burden of proving fairness in this class of case is upon the purchaser if he would sustain the transaction.[46]

The incompetent has consistently taken the position that the burden of showing lack of knowledge is on Waialua if it would seek to avoid cancellation without restoration.[47] Waialua, in its third answer (R. 409), pleaded that it was a bona fide purchaser, but it offered absolutely no proof thereof. To the suggestion (p. 106) that "all Waialua's representatives were either dead or permanently incapacitated from testifying", may we point out that the president of the company, Mr. Tenney (R. 1479), Mr. Castle's associate attorney, Mr. Greenwell (R. 1349), and Waialua's General Manager who was in direct charge of land purchases during this period, Mr. Goodale (R. 1238), all testified in this case and none of them was asked whether he knew of Eliza Christian's incompetency.

45. Opening Brief Eliza R. P. Christian, p. 29, fn. 13.

46. Opening Brief Eliza R. P. Christian, p. 25, fns. 9, 10, 11.

47. Before the trial Court, "Petitioner's Opening Argument on the Facts", page 6, "to become entitled to receive back its purchase money with interest, this respondent must, however, do more than show it paid an adequate consideration. It must further show that the moneys paid were actually received by and enjoyed by the incompetent herself and that it had no notice or knowledge, constructive or actual, of her incapacity";

Before the Supreme Court of Hawaii, Brief for Petitioner Appellee, at page 153: "On the other hand, after mental incompetency has been shown and established, the burden is upon the other party to the transaction to establish all matters urged in an effort to avoid concellation such as perfect good faith, complete adequacy of consideration, that the benefit has been received and enjoyed by the incompetent, that there cannot be restoration to status quo, and the like";

Before the trial Court, on the remand proceeding (R. 1478): "Prior to the testimony of the following witnesses counsel for petitioner stated that he did not object to the reception of any evidence which might bear on the question of notice as to the mental condition of Eliza R. P. Christian."

Perhaps Waialua considered it to be the lesser of two evils to refrain from putting the question.

As to the evidence on the question of Holt's agency, we confidently refer to our opening brief[48] for a complete resume of the record which can lead to no other conclusion. It was admitted in Waialua's answer (R. 65-66) when it alleged that it "entered into an arrangement with said James L. Holt for the acquiring of a two-thirds interest in said lands * * * including the share and expectancy of said Eliza * * * and the interest owned by said James L. Holt and understood that said * * * Holt would and did * * * secure the conveyance of the interest of said Eliza * * * so that said interest might be united with those which he had acquired from his father * * *." The findings are clearly that Holt was the agent. The trial Court said (R. 112):

> "Stripped of verbiage and incidental issues * * * the amended petition, in the light of admissions made during the trial, alleges that on May 2, 1910 respondent Waialua Agricultural Company, Ltd. * * * procured a conveyance to be executed for its benefit by the petitioner * * *."

and again (R. 147):

> "What the suggestion would now be if Waialua Company had been content to deal with James L. Holt at arms' length after he, Holt, had acquired the rights of Eliza, is not the question before this court."

and again (R. 147-8):

> "In fact, the company * * * closed the transaction * * * using James L. Holt merely as a 'dummy' grantee."

48. Opening Brief Eliza R. P. Christian, pp. 30-47.

and again (R. 155):

> "The fact is that Waialua Company, in its haste to close the purchase, took direct charge of the transaction, and while attempting to preserve the form of a secondary position it in substance became the purchaser in fact. It does not qualify as a 'subsequent grantee'."

and again (R. 473):

> "It was nominally a deed to James L. Holt but he was simply an instrument in the securing of title by Waialua Company."

and again (R. 482):

> "That is, the May 2, 1910 transaction must always be considered with the fact that Waialua Company took over and completed as their own the negotiations of James L. Holt * * *."

Neither the Supreme Court of Hawaii nor the Circuit Court of Appeals in any way criticized these findings. They simply did not apply the legal principle of imputed notice to these facts and to the additional finding that Holt had knowledge of the incompetency. However, the stipulation made by Waialua at the trial is clearly an admission that James L. Holt was acting for it in the purchase. The record states (1061):

> "Counsel for Waialua then admitted that the purchase of May 2, 1910 was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the respondent no different status than it had by virtue of the deed of May 2, 1910 * * *."

Counsel state the force of only the second half of the stipulation in their brief (p. 107).

There can be no question that Holt had knowledge of the incompetency during the very time he was arranging the purchase for Waialua, and accordingly the cases cited by Waialua,[49] that knowledge acquired by an agent long before the agency was created will not be imputed unless it is clearly shown that at the time he acted for his principal the knowledge was present in his mind, are not in point. Holt testified (R. 1014, 1009) that at the time of the transaction he knew she was incompetent. The trial Court so found, stating (R. 133):

> "Eliza's incompetency was known to James L. Holt * * *."

and again (R. 147):

> "Both he (Lawrence Kentwell) and James L. Holt at Honolulu must have known of Eliza's incompetency in fact * * *."

and again speaking of the 1906 contract (R. 481):

> "Approach this indenture from the fact that * * * Annie Kentwell transferred (if it could be transferred) to James L. Holt with knowledge of its infirmity."

and again (R. 482):

> "That is, the May 2, 1910 transaction must always be considered with the fact that Waialua Company took over and completed as their own the negotiations of James L. Holt * * * knowing and concealing a

49. 2 *Mechem on Agency* (2d Ed.), Sec. 1809; *Constant v. University* (1889), 111 N. Y. 604, 19 N. E. 631; *Equitable Securities Co. v. Sheppard* (1900), 78 Miss. 217, 28 So. 842; *The Distilled Spirits* (1871), 11 Wall. 356, 366, 20 L. Ed. 167.

> secret profit to James L. Holt and John R. Colburn, while these two at the same time knew of the mental condition of Eliza Christian."

and again (R. 492):

> "Also in May, 1910 Waialua Company * * * adopted the negotiations of James L. Holt, who knew of Eliza's incompetency * * *."

There was nothing "constructive" about Holt's knowledge of the incompetency, as suggested by Waialua (p. 109). These findings are in no way disturbed by the Supreme Court of Hawaii or the Circuit Court of Appeals.

Waialua seeks to avoid the force of these two unquestioned facts, namely, Holt's agency and his knowledge of the incompetency, by arguing (pp. 107-8) that Holt had "an adverse interest", which, it contends, excepts Waialua from the operation of the rule that it is charged with his knowledge. As we pointed out in our opening brief, Holt was compensated for his services, but this circumstance does not bar the operation of the rule. Agents always make a profit of some kind, and it is frequently contingent. Waialua does not cite a single case indicating that a contingent profit for the agent in the bargain has any such effect. The contingent benefit does not so operate.[50] We fail to see anything "dangerous", as Waialua argues (p. 110) in holding that it cannot claim the benefit

50. Restatement of the Law of Agency, Vol. I, Sec. 282, p. 627, wherein it is said:

> "b. *Meaning of 'acting adversely'.* The mere fact that the agent's primary interests are not coincident with those of the principal does not prevent the latter from being affected by the knowledge of the agent if the agent is acting for the principal's interests. The rule as stated herein is substantially similar to the rule stated in Secs. 235-236, dealing with the liability of a principal or master for the torts of his agent, and the Comment on those Sections is applicable.
>
> Illustration:
>
> 4. P appoints A to negotiate for Blackacre, agreeing to pay him a commission of 10 per cent. if he succeeds in persuading the owner to

of Holt's acts without accepting the burdens incident thereto, and believe the decisions of this Court in *Veazie v. Williams,* supra, and *Curtis v. United States* (1923), 262 U. S. 215, 67 L. Ed. 956, laid down the proper rule. Waialua's cases[51] do not impair the authority of those decisions.

Waialua is in error when it says (p. 106) that the agency point was not raised in the Supreme Court of Hawaii. It was pleaded in the complaint (R. 84-86), admitted in the answer (R. 103-104), stipulated to by Waialua (R. 1061), urged to the Supreme Court on Appeal, and even argued by Waialua in the Supreme Court.[52] Clearly, the point was raised in the Supreme Court of Hawaii.

The price was not adequate.

Waialua points (p. 111) to the finding by the Supreme Court that the price for the deed was adequate. We referred[53] to the finding of the trial Court (R. 159) that it was inadequate and submit that the trial judge who heard the evidence is better able to judge its probative value than the intermediate Appellate Court. Beyond that we submit that the reasoning of the trial judge is definitely

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sell it. In investigating the title, A discovers an equity held in it by T and, believing that the transaction will not be consummated if he reveals this equity to P, conceals his knowledge from P, who buys Blackacre upon A's favorable report. P is affected by A's knowledge."

51. *Allen v. Seckham,* 11 C. D. 790; *Bailey v. Barnes* (1894), 1 Chan. 25; *Wittenbrock v. Parker* (1894), 102 Cal. 93, 36 Pac. 374; *Trentor v. Pothen* (1891), 46 Minn. 298, 49 N.W. 129; *U. S. v. Detroit Lbr. Co.* (1906), 200 U.S. 321, 50 L. Ed. 499.

52. Brief for Petitioner-Appellee at p. 278:

"* * * nevertheless the knowledge of James L. Holt who, on the evidence was unquestionably acting for Waialua throughout the whole transaction of 1910, would be imputed to his principal."

Reply Brief of Waialua Agricultural Company, Ltd., p. 53:

"Nor is there the slightest foundation for the claim that James L. Holt, who with John F. Colburn was Waialua's vendor of the various interests in the property, was acting as its agent in the transaction of 1910."

53. Opening brief of Eliza R. P. Christian, p. 23.

better (R. 139, et seq.). Between 1899 and 1910, Waialua purchased seven undivided 1/27th interests from the various Holt heirs. Some were purchased at foreclosure sales—others were acquired in arms' length transactions. The trial judge refers to them in his discussion of values (R. 139, et seq.). We rest on his finding that the interest of the incompetent in 1910 was fairly worth $71,778.20, whereas Waialua paid only $30,000 therefor.

The incompetent did not receive the consideration paid by Waialua.

It was the incompetent's position in her cross-petition for the writ of certiorari, and was repeated in her opening brief herein, that Waialua should not recover the $30,000 paid for the deed, with interest, as directed by the Circuit Court of Appeals, because the finding is that she never received it.[54] Waialua answers this argument by saying (pp. 113-117) that the trial Court found that the incompetent did receive the consideration. The transcript references which Waialua gives do not bear it out. The trial Court found only that Waialua paid the money "to those who then had and continue to have charge of the petitioner" (R. 159); and later, referring to the consideration, said "which she never received" (R. 518). The Supreme Court said (R. 294) "that the grantor did not receive the consideration paid by the grantee"; and again (R. 301):

> "There are other considerations which confirm us in the view that it would be inequitable to permit the deed in question to remain uncancelled. One of these is that we believe from the evidence that Eliza never received the money that was paid for her interest. Another is

54. Cross-petition for Writ of Certiorari, p. 9.

that we also believe from the evidence that the disposal of her interest was not for her benefit."

Waialua states (p. 114) that the deed bearing the incompetent's signature recites a consideration and that that is a receipt showing payment of the purchase price. The incompetent's "receipt" is as invalid as the other instruments. She had no capacity to give a receipt. Without going into an involved discussion of the circumstances of the alleged payment, we concede that Waialua parted with the money, but we believe that the finding of the two Courts was correct that the incompetent never received it.[55] Before Waialua can recover the purchase price paid it must appear that the incompetent received it, and the finding is to the contrary regardless of any question of any difficulty that Waialua might have had with its proof. Such being the case, it should not be a condition to the cancellation that restoration of the $30,000 with interest, which now totals over $80,000, be paid to Waialua.[56]

CONCLUSION

We respectfully submit that as to the incompetent the lease of 1905, the contract of 1906 and the deed of 1910 should all be cancelled without requiring restoration of the purchase price paid by Waialua or the payment of the value of the improvements placed upon the property, and without any additional finding of incompetency in 1905.

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55. See offer of proof (R. 1343, and R. 1195, 1196).

56. *McKenzie v. Donnell* (1899), 151 Mo. 431, 52 S.W. 214, 151 Mo. 461, 52 S.W. 222; *Jordan v. Kirkpatrick* (1911), 251 Ill. 116, 95 N.W. 1079; *Hughes v. Cream* (1929), 178 Minn. 545, 227 N.W. 654; *Doty v. Mumma* (1924), 305 Mo. 188, 264 S.W. 656; 46 A.L.R. 416, at 429; 95 A.L.R. 1442, at 1446 and 1447.

and 1906 by the trial Court. We submit further that this Court should direct the entry of judgment herein in favor of the incompetent for the reasonable rental value of her interest since her title vested in 1922, which value has been found[57] by the trial Court (and the finding is not disturbed by either the Supreme Court of Hawaii or the circuit Court of Appeals nor questioned by Waialua) to be $677,005.75 for the period ending on the date of its decree, September 6, 1932, together with interest thereon from said date at the legal rate. We further submit that the direction of judgment for rents, as aforesaid, should be made without prejudice to the incompetent to proceed as she may be advised to recover in any later action for rents accruing for the occupation of her interest in the land from and after said September 6, 1932.

Dated, San Francisco, California,
September 29, 1938.

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Charles M. Hite,
Attorneys for Eliza R. P. Christian,
An Incompetent Person.

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57. Amount found due on September 6, 1932, after deducting $30,000 with interest at 6% from May 2, 1910 (R. 535) $606,785.75
Add: $30,000 with interest at 6% from May 2, 1910 to September 6, 1932 (R. 527) 70,220.00
Total $677,005.75